Chew Wai Keong & Anor v Public Prosecutor and another appeal

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05–38–02 OF 2014(A) AND 05–37–02 OF 2014(A)
AHMAD MAAROP CJ (MALAYA), ZAINUN ALI, AZAHAR MOHAMED, ZAHARAH IBRAHIM AND AZIAH ALI FCJJ
23 FEBRUARY 2018

Criminal Law — Kidnapping Act 1961 — s 3 — Whether forceful and wrongful detention established — Whether kidnapped for ransom — Whether kidnapper able to exert will over kidnapped person — Whether kidnapper had knowledge of abduction and captivation — Whether there was incriminating evidence against kidnapper — Whether there was common intention — Whether circumstantial evidence established that accused persons were perpetrators of offences in furtherance of common intention

Criminal Law — Murder — Cause of death — Forceful blow causing bone fractures and internal bleeding caused blood to enter airway resulting in breathing difficulties — Whether act of causing facial injuries fell within s 300(c) of the Penal Code — Whether deceased suffered any other ailments that could have contributed to death — Whether trial judge considered issue of actus reus — Penal Code s 302

The appellants were jointly charged, in furtherance of a common intention, with committing two offences, namely, kidnapping under s 3 of the Kidnapping Act 1961, and murder under s 302 of the Penal Code ('the Code'), of one Teh Wai Toong ('the deceased'). The prosecution's case was that the sister of the deceased ('PW26') received a message from the deceased's handphone on 21 April 2007, a day after he had left his house, saying that he had gone to Penang with his friends and would be back on 23 April 2007. PW26's calls to him after the message went unanswered. On 23 April 2007, PW26 received a message from the deceased's handphone informing her that he had gone to meet one Dolphine and would be back home around 9.30pm. Later, PW26 received a call from the deceased's handphone and the caller, who spoke in Cantonese, told her that the deceased was in his hands and warned her not to report to the police. However, on the same day, PW26 lodged a police report. On 24 April 2007, PW26 received a message asking her to get ready with cash in the sum of RM200,000. PW26 received more messages the following day and subsequently, on 26 April 2007, PW26 received a message demanding RM200,000 for the return of the deceased. The caller had also given instructions as to how and when the money should be delivered. On the night

of 29 April 2007, PW26 followed the instructions given through the handphone of the deceased as to the location where the ransom money was to be dropped off. However, the caller, who kept changing the locations for the dropping of the money, stopped and no drop off was made. There was no further contact from the kidnapper after that. The body of the deceased was found dumped at a rubbish dump site on 29 April 2007. The pathologist ('PW18'), who conducted the post-mortem, confirmed that the cause of death was difficulty in breathing resulting from accumulation of blood in the lungs due to bleeding caused by injury to the facial bone. The prosecution adduced identification evidence via PW11 and PW12, a sales promoter and a cashier respectively, at Jaya Jusco Ipoh, who identified the second appellant as the person who had come to buy a Sony handycam and a Canon printer on 21 April 2007 and paid for the purchases with a credit card in the name of the deceased. The following day, the second appellant came again and purchased several items including a teddy bear. PW12 testified that she could recognise the second appellant because he was wearing the same black cap and faded blue jacket on both occasions. In their defence, the appellants essentially denied any involvement in the commission of the offences. They admitted that they had rented a house in Bercham ('Bercham house') for the purpose of their business of repairing and servicing of computers. However, both denied going to the house during the period from 20–29 April 2007 as, according to the first appellant, there was no order from their clients to repair computers. Both put up the defence of alibi and contended that the perpetrator of the crimes was most probably Dolphine because during the material period Dolphine had access to the Bercham house. The High Court judge found the appellants guilty and they were accordingly convicted and sentenced to death in respect of each charge. Their appeals to the Court of Appeal were dismissed. Hence, these appeals. The appeal against the first appellant was struck out as the first appellant had passed away before the commencement of the appeal.

Held, dismissing the appeal against conviction and sentence on both charges; affirming the conviction and death sentence imposed by High Court and affirmed by Court of Appeal:

(1) The thrust of the defence submissions before the trial judge was that the evidence of PW18 had left the cause of death open to several inferences because PW18 had admitted in cross-examination that there were other injuries, not necessarily the facial injuries, that contributed to the death of the deceased. Although the trial judge did not specifically state the act that caused the facial injuries, by accepting the evidence of PW18 on the cause of death, by necessary implication, the trial judge had also accepted the opinion of PW18 on what had caused the facial injuries. Therefore, it was not correct to say that the trial judge had failed to consider the issue of actus reus (see paras 115 & 117).

(2) At the conclusion of his testimony, PW18's finding that the facial injuries were inflicted by a forceful blow with a blunt object remained unchanged. The resultant bone fractures and internal bleeding caused blood to enter the airway. The deceased could not breathe and he died. On the evidence, the facial injuries were caused by a forceful blow or blows to the deceased's face. In the circumstances, the act that caused the facial injuries came within the provisions of limb (c) of s 300 of the Code. Further, the evidence of PW18 showed that he did not find any indication that the deceased had suffered from any ailments or physical infirmities to suggest that the death of the deceased could have been due to other causes. On the contrary, his report showed that the deceased was a healthy young man. Neither PW26 nor PW32, father of the deceased, who were the deceased's close family members, were cross-examined on the state of the deceased's health (see paras 119–120).

(3) The prosecution, through the evidence of witnesses, had proven that the deceased had been kidnapped for ransom. There was overwhelming evidence that the deceased was forcefully and wrongfully detained. The presence of his DNA on some of the exhibits recovered from the Bercham house particularly his shorts and the receipt from Tejani Medical Services Sdn Bhd in his name, fortified the prosecution's case that the Bercham house was where the offences were committed (see paras 121 & 124).

(4) The prosecution had proved that it was the second appellant who had used the deceased's credit card on 21 and 22 April 2007 at Jaya Jusco Ipoh to buy the handycam and the teddy bear, which were recovered from the second appellant. This finding demolished the contention of the second appellant that it was Dolphine who had used the deceased's credit card to purchase the handycam at Jaya Jusco Ipoh. The evidence that the second appellant had in his possession the credit card of the deceased established a link between the second appellant and the deceased. It showed that from 21 April 2007 he had access to and control over the deceased. The evidence that he had used the deceased's credit card for his own purpose showed that the second appellant was able to exert his will over the deceased. The irresistible inference that arose from this evidence was that he must have known that the deceased had been abducted and was held captive at the Bercham house. This evidence incriminated him in the kidnapping of the deceased (see paras 132–133).

(5) The testimony of the second appellant showed that from the time they had started renting the house on 9–16 April 2007 (the date when he said the last computer was repaired), he had repaired and serviced about 23 computers. Accordingly, the decision of the trial judge not to accept the explanation of the first appellant, that there was no computer to

repair or service between 18 and 29 April 2007, was not unreasonable. It was strange that suddenly from 18 April 2007 there was no computer to repair or service (see para 135). A

(6) The failure by the police to investigate the alibi notice had not prejudiced the second appellant's defence. The alibi witnesses were the second appellant's close family members. Had investigation been carried out and statements recorded from these witnesses, it was reasonable to expect that whatever statement that they may give would not be different from their testimony in court. On the contrary, the failure of the police to investigate the alibi notice had deprived the prosecution of the opportunity to rebut the alibi evidence, which would be to the second appellant's advantage (see para 143). B C

(7) Presence at the scene of the crime is not necessary for s 34 of the Code to apply but presence on the spot for the purpose of facilitating or promoting the offence is itself tantamount to actual participation in the criminal act. It is essential that there should be evidence of common intention, or evidence from which such common intention to commit the offence actually committed can properly be inferred. There was sufficient evidence to show that both the appellants had acted in concert to kidnap the deceased and later murdered him. Both the first and second appellants were friends. The first appellant knew the deceased. The second appellant testified that he did not know the deceased. Hence, the reasonable possibility as to how the second appellant had the credit card of the deceased was that he had been given the card by the first appellant. The act of renting the Bercham house was evidence of a pre-arranged plan. The tenancy of the house commenced on 9 April 2007. Approximately two weeks later, the deceased was kidnapped. The usage of the deceased's credit card together with the recovery of the handycam and the teddy bear showed that the second appellant was complicit with the first appellant in the commission of the crimes. Hence, there was no merit in the second appellant's appeal and the conviction was safe (see paras 146, 149–150 & 153). D E F G

(8) Although Dolphine was alleged to be the real perpetrator of the crimes in the appellants' defence, at no time did the appellants inform the police about Dolphine. Neither was any question put to any of the prosecution witnesses that Dolphine was the person who had committed the crimes. Further, the suggestion that Dolphine was the perpetrator of the crimes surfaced only during the defence stage. The first appellant described Dolphine but the particulars given in his evidence were too sketchy to be meaningful. Hence, the defence was an afterthought. The introduction of this belated version certainly weakened the appellants' credibility. Even if Dolphine existed, there was no evidence to link him to the crimes except for the allegations made by the appellants (see paras 151–152). H I

[Bahasa Malaysia summary

Perayu-perayu dituduh bersama-sama, dalam lanjutan niat bersama, melakukan dua kesalahan, iaitu, menculik di bawah s 3 Akta Penculikan 1961, dan membunuh di bawah s 302 Kanun Keseksaan ('Kanun'), seorang bernama Teh Wai Toong ('si mati'). Kes pendakwaan adalah bahawa kakak si mati ('PW26') menerima mesej melalui telefon bimbit si mati pada 21 April 2007, sehari selepas dia keluar dari rumahnya, menyatakan bahawa dia ke Pulau Pinang dengan kawan-kawannya dan akan pulang pada 23 April 2007. Panggilan PW26 ke telefon bimbit si mati tidak dijawab. Pada 23 April 2007, PW26 menerima mesej dari telefon bimbit si mati bahawa dia telah pergi menemui seorang bernama Dolphine dan akan pulang ke rumah kira-kira 9.30 malam. Kemudian, PW26 menerima panggilan dari telefon bimbit si mati dan pemanggil, yang berbahasa Kantonis, memberitahu kepadanya bahawa si mati berada dalam tangannya dan memberi amaran supaya tidak melaporkan kepada pihak polis. Walau bagaimanapun, pada hari yang sama, PW26 membuat laporan polis. Pada 24 April 2006, PW26 menerima mesej meminta dia menyediakan wang tunai sejumlah RM200,000. PW26 terus menerima beberapa lagi mesej pada keesokan harinya dan kemudian, pada 26 April 2007, PW26 menerima mesej menuntut RM200,000 sebagai ganti pengembalian si mati. Pemanggil itu juga memberikan arahan bagaimana dan bila wang tersebut perlu diserahkan. Pada malam 29 April 2007, PW26 mengikuti arahan-arahan yang diberi melalui telefon bimbit si mati mengenai lokasi di mana wang tebusan perlu diserahkan. Walau bagaimanapun, pemanggil, yang kerap menukar lokasi penghantaran wang itu, menghentikan panggilan dan penghantaran wang tidak dilakukan. Selepas itu, penculik tidak lagi menghubungi. Mayat si mati ditemui dibuang di kawasan buangan sampah pada 29 April 2007. Pakar patologi ('PW18') yang melakukan bedah siasat mengesahkan bahawa sebab kematian adalah kesukaran bernafas akibat pengumpulan darah di paru-paru kerana pendarahan akibat kecederaan tulang muka. Pihak pendakwaan mengemukakan keterangan pengecaman melalui PW11 dan PW12, masing-masing jurujual dan juruwang di Jaya Jusco Ipoh, yang mengecam perayu kedua sebagai orang yang datang membeli kamera mudah guna Sony dan pencetak Canon pada 21 April 2007 dan membayar belian tersebut dengan kad kredit atas nama si mati. Hari berikutnya, perayu kedua datang lagi dan membeli beberapa barang termasuk anak patung beruang. PW12 memberikan keterangan bahawa dia boleh mengecam perayu kedua kerana dia memakai topi hitam dan jaket biru yang luntur pada kedua-dua hari tersebut. Dalam pembelaan mereka, pada asasnya, perayu-perayu menafikan penglibatan dalam pelakuan kesalahan-kesalahan tersebut. Mereka mengakui bahawa mereka menyewa sebuah rumah di Bercham ('rumah Bercham') untuk tujuan perniagaan membaiki dan servis komputer. Walau bagaimanapun, kedua-dua mereka menafikan pergi ke rumah itu pada 20–29 April 2007 kerana, menurut perayu pertama, tiada pesanan daripada pelanggan mereka untuk membaiki komputer. Kedua-dua

mereka membangkitkan pembelaan alibi dan menghujahkan bahawa pelaku jenayah-jenayah tersebut besar kemungkinannya adalah Dolphine kerana pada masa material Dolphine mempunyai akses ke rumah Bercham. Hakim Mahkamah Tinggi mendapati perayu-perayu bersalah dan mereka disabitkan dan dijatuhkan hukuman mati bagi setiap pertuduhan. Rayuan-rayuan mereka ke Mahkamah Rayuan ditolak. Oleh itu, rayuan-rayuan ini. Rayuan terhadap perayu pertama dibatalkan kerana perayu pertama meninggal dunia sebelum rayuan bermula.

Diputuskan, menolak rayuan terhadap sabitan dan hukuman atas kedua-dua pertuduhan; mengesahkan sabitan dan hukuman mati yang dijatuhkan oleh Mahkamah Tinggi dan disahkan Mahkamah Rayuan:

(1) Inti pati penghujahan pembelaan di hadapan hakim bicara adalah bahawa keterangan PW18 menjadikan sebab kematian terbuka pada beberapa anggapan kerana PW18 telah mengakui dalam pemeriksaan balas bahawa terdapat kecederaan-kecederaan lain, tidak semestinya, kecederaan pada muka, yang menyumbang pada kematian si mati. Walaupun hakim bicara tidak menyatakan tindakan yang mengakibatkan kecederaan-kecederaan muka secara spesifik, dengan menerima keterangan PW18 tentang sebab kematian, melalui implikasi yang perlu, hakim bicara juga menerima pendapat PW18 tentang apa yang mengakibatkan kecederaan-kecederaan muka. Oleh itu, tidak benar untuk mengatakan bahawa hakim bicara gagal mempertimbangkan isu actus reus (lihat perenggan 115 & 117).

(2) Pada penutup keterangannya, dapatan PW18 bahawa kecederaan-kecederaan muka diakibatkan oleh daya kekuatan menggunakan objek tumpul kekal tidak berubah. Kepatahan tulang dan pendarahan dalaman mengakibatkan darah mengalir ke saluran pernafasan. Si mati tidak boleh bernafas membawa pada kematiannya. Berdasarkan keterangan, kecederaan-kecederaan tulang muka diakibatkan oleh daya yang kuat pada muka si mati. Dalam keadaan tersebut, tindakan yang mengakibatkan kecederaan muka terangkum dalam peruntukan bahagian (c) s 300 Kanun. Selanjutnya, keterangan PW18 menunjukkan bahawa dia tidak menemui apa-apa indikasi bahawa si mati mengalami apa-apa kesakitan atau kecacatan fizikal yang mencadangkan kematiannya mungkin diakibatkan oleh sebab-sebab lain. Sebaliknya, laporannya menunjukkan bahawa si mati adalah orang muda yang sihat. PW26 dan PW32, bapa si mati, yang merupakan ahli keluarga terdekat si mati juga tidak disoal balas mengenai keadaan kesihatan si mati (lihat perenggan 119–120).

(3) Pihak pendakwaan, melalui keterangan saksi-saksi, telah membuktikan bahawa si mati diculik untuk wang tebusan. Terdapat keterangan yang cukup banyak bahawa si mati ditahan secara paksa dan secara salah.

Kewujudan DNA pada beberapa ekshibit yang diambil dari rumah Bercham khususnya seluar pendeknya dan resit dari Tejani Medical Services Sdn Bhd atas namanya menguatkan kes pendakwaan bahawa rumah Bercham adalah tempat kesalahan-kesalahan tersebut dilakukan (lihat perenggan 121 & 124).

(4) Pihak pendakwaan telah membuktikan bahawa perayu kedua yang menggunakan kad kredit si mati pada 21 dan 22 April 2007 di Jaya Jusco Ipoh untuk membeli kamera mudah guna dan anak patung beruang, yang didapati daripada perayu kedua. Dapatan ini mematahkan hujahan perayu kedua bahawa Dolphine yang menggunakan kad kredit si mati untuk membeli kamera mudah guna di Jaya Jusco Ipoh. Keterangan bahawa perayu kedua mempunyai kad kredit dalam milikannya membuktikan kaitan antara perayu kedua dan si mati. Ini menunjukkan bahawa dari 21 April 2007, dia mempunyai akses dan kawalan atas si mati. Keterangan bahawa dia menggunakan kad kredit si mati bagi tujuannya sendiri menunjukkan bahawa perayu kedua boleh menggunakan kuasa terhadap si mati. Anggapan tak boleh sangkal yang timbul daripada keterangan ini adalah, dia mengetahui bahawa si mati telah diculik dan dikurung di rumah Bercham. Keterangan ini menunjukkan kebersalahannya dalam penculikan si mati (lihat perenggan 132–133).

(5) Keterangan perayu kedua menunjukkan bahawa dari masa mereka mula menyewa rumah tersebut pada 9–16 April 2007 (tarikh yang dinyatakannya sebagai hari akhir komputer terakhir dibaiki), dia telah membaiki dan servis kira-kira 23 komputer. Oleh itu, keputusan hakim bicara untuk tidak menerima penjelasan perayu pertama, bahawa tiada komputer untuk dibaiki atau servis antara 18 dan 29 April 2007, bukan tidak munasabah. Aneh jika tiba-tiba dari 18 April 2007 tiada komputer untuk dibaiki atau servis (lihat perenggan 135).

(6) Kegagalan pihak polis menyiasat notis alibi tidak memprejudis pembelaan perayu kedua. Saksi-saksi alibi adalah ahli keluarga terdekat perayu kedua. Jika penyiasatan dilakukan dan kenyataan-kenyataan yang direkodkan daripada saksi-saksi ini dijalankan, adalah munasabah untuk mengharapkan bahawa apa-apa kenyataan yang mereka mungkin berikan tidak akan berbeza daripada keterangan mereka di mahkamah. Sebaliknya, kegagalan pihak polis menyiasat notis alibi menafikan pihak pendakwaan peluang mematahkan keterangan alibi, memberi kelebihan kepada perayu kedua (lihat perenggan 143).

(7) Untuk mengguna pakai s 34 Kanun, kehadiran di tempat kejadian jenayah tidak diperlukan tetapi kehadiran di situ bagi tujuan memudahkan atau membantu kesalahan itu sendiri membentuk penyertaan sebenar dalam tindakan jenayah tersebut. Penting bahawa perlu ada keterangan niat bersama, atau keterangan yang daripadanya

anggapan niat bersama untuk melakukan kesalahan yang sebenarnya telah dilakukan boleh sewajarnya dibuat. Terdapat keterangan yang mencukupi untuk menunjukkan bahawa kedua-dua perayu bertindak bersama untuk menculik si mati dan kemudian membunuhnya. Perayu pertama dan kedua berkawan. Perayu pertama mengenali si mati. Perayu kedua memberikan keterangan bahawa dia tidak mengenali si mati. Oleh itu kemungkinan yang munasabah bagaimana perayu kedua memiliki kad kredit si mati adalah dia diberi kad itu oleh perayu pertama. Tindakan menyewa rumah Bercham adalah pelan yang diatur terdahulu. Sewaan rumah itu bermula dari 9 April 2007. Kira-kira dua minggu kemudian si mati diculik. Penggunaan kad kredit si mati bersama-sama dengan penemuan kamera mudah guna dan anak patung beruang menunjukkan perayu kedua bersubahat dengan perayu pertama dalam melakukan jenayah itu. Oleh itu, tiada merit dalam rayuan perayu kedua dan sabitannya selamat (lihat perenggan 146, 149–150 & 153).

(8) Walaupun Dolphine dikatakan adalah pelaku sebenar jenayah tersebut dalam pembelaan perayu-perayu, polis tidak dimaklumkan pada bila-bila masa tentang Dolphine. Juga, tiada soalan dikemukakan kepada mana-mana saksi pendakwaan bahawa Dolphine adalah orang yang telah melakukan jenayah-jenayah itu. Selanjutnya, cadangan bahawa Dolphine adalah pelaku jenayah hanya timbul pada peringkat pembelaan. Perayu pertama menggambarkan Dolphine tetapi butir-butir yang diberikan dalam keterangannya amat tidak lengkap untuk membawa apa-apa makna. Dengan itu, pembelaan tersebut adalah fikiran terkemudian. Pengemukaan versi yang lewat ini sememangnya melemahkan kredibiliti perayu-perayu. Walaupun Dolphine wujud, tiada keterangan untuk mengaitkan dia dengan jenayah-jenayah itu kecuali dakwaan-dakwaan yang dibuat perayu-perayu (lihat perenggan 151–152).]

Notes

For a case on cause of death, see 4(2) *Mallal's Digest* (5th Ed, 2015) para 1743. For cases on s 3, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 1297–1298.

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor [1987] 2 MLJ 336, SC (refd)

Amri bin Ibrahim & Anor v PP and another appeal [2017] 1 MLJ 1; [2017] 1 CLJ 617, FC (refd)

Belhaven and Stenton Peerage (1875) 1 App Cas 278, HL (refd)

Farose bin Tamure Mohamad Khan v PP and other appeals [2016] 6 MLJ 277; [2016] 9 CLJ 769, FC (refd)

Idris v PP [1960] 1 MLJ 296; [1960] 1 LNS 40, CA (refd)

Ong Teik Thai v PP [2017] 4 MLJ 421; [2016] 7 CLJ 1, FC (refd)

A *R v Turnbull and others* [1976] 3 All ER 549, CA (refd)
Shamsuddin bin Hassan & Anor v PP [1991] 3 MLJ 314; [1991] 3 CLJ 2414; [1991] 1 CLJ Rep 428, SC (refd)
Tan Kim Ho & Anor v Public Prosecutor [2009] 3 MLJ 151 ; [2009] 3 CLJ 236, FC (refd)

B

Legislation referred to

Kidnapping Act 1962 s 3
Penal Code ss 34, 300(c), 302

C **Appeal from:** Criminal Appeal Nos A-05–317 of 2012 and 318–12 of 2012 (Court of Appeal, Putrajaya)

Amer Hamzah Arshad (Joshua Tay with him) (Nizam, Amer & Sharizad) for the second appellant.
D *Tetralina bt Ahmed (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

Aziah Ali FCJ (delivering judgment of the court):

E INTRODUCTION

[1] The first appellant, Chew Wai Keong, and the second appellant, Yan Wai Seng, were jointly charged, in furtherance of a common intention, with committing two offences namely, the kidnapping under s 3 of the Kidnapping
F Act 1962 and the murder under s 302 of the Penal Code of one Teh Wai Toong ('the deceased').

[2] The first charge reads as follows:

> G Bahawa kamu bersama-sama pada 20 April 2007, jam lebih kurang 11.00 malam hingga 26 April 2007 jam lebih kurang 2.30 petang, di rumah No 2, Laluan Bercham Utara 17, Taman Utama, Ipoh, dalam Daerah Kinta, dalam Negeri Perak Darul Ridzuan, telah mencolek Teh Wai Toong, KPT No 761221-08-5981, untuk mendapatkan wang tebusan sebanyak RM200,000.00 dengan cara mengurung secara tidak sah. Oleh yang demikian kamu telah melakukan suatu kesalahan yang
> H boleh dihukum di bawah Seksyen 3 Akta Colek 1962 (Akta 365) dibaca bersama Seksyen 34 Kanun Keseksaan.

The second charge reads as follows:

> I Bahawa kamu bersama-sama pada di antara 26 April 2007 jam lebih kurang 2.30 petang sehingga 29 April 2007 jam lebih kurang 2.30 petang, di rumah No 2, Laluan Bercham Utara 17, Taman Utama, Ipoh, dalam Daerah Kinta, dalam Negeri Perak Darul Ridzuan, telah melakukan pembunuhan ia itu menyebabkan kematian ke atas Teh Wai Toong, KPT No 761221-08-5981. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan dan dibaca bersama Seksyen 34 Kanun yang sama.

[3] At the High Court, the first appellant was the first accused and the second appellant was the second accused. At the conclusion of the trial, the judge found that the prosecution had proved its case beyond reasonable doubt against both appellants in respect of both charges. The appellants were found guilty and convicted and they were sentenced to death in respect of each charge. Their appeals to the Court of Appeal were dismissed, hence these appeals.

[4] At the commencement of the appeal before us, learned counsel for the second appellant, Encik Amer Hamzah Arshad informed us that the first appellant had passed away. This was confirmed by the learned deputy public prosecutor ('DPP') Puan Tetralina Ahmed Fauzi, who appeared for the respondent. We therefore struck out the appeal by the first appellant and proceeded with the appeal by the second appellant.

[5] The facts of the case have been set out fully in the grounds of judgment of the trial judge. In this judgment we set out the evidence adduced by the prosecution.

THE PROSECUTION'S CASE

[6] Teh Wei Leng ('PW26'), the deceased's sister, testified that on Friday 20 April 2007, about 10pm, the deceased, who was also known as 'Tony', left their family home in his car, a Hyundai Elantra with the registration No AEJ 6928 (exh P35).

[7] The next day ie on 21 April 2007, when the deceased had not returned home she used her handphone with the No 0165202639 (exh P133A) to call the deceased's handphone No 0125226543 (exh P19A) numerous times. PW26 also sent messages to the deceased's handphone but received no response. About 5pm that day, she received a message from the deceased's handphone saying that he had gone to Penang with friends, that he was drunk and would be back on Monday. PW26 made calls to the deceased, but he did not answer the call.

[8] On Monday 23 April 2007 between 4 and 5pm, PW26 received a message from the deceased's handphone stating as follows:

> Sorry to make u all worried told mum I will come back today after I meet Dolphine than I come back and will reach home around 9.30 pm.

PW26 replied to say that if she did not see him by that time, she would lodge a police report. Later at about 7pm, PW26 received a call from the deceased's handphone. The caller was a man who spoke in Cantonese.

[9] The caller told PW26 that the deceased was in his hands and not to report to the police. A short while later PW26 received a message from the deceased's handphone. PW26 then lodged Chemor Report No 886/07 (exh P132). The message that PW26 received as recorded in exh P132 reads as follows:

> Tony in my hand, if you don't anything happen to him, you wait for my instruction, if u lodge police then u may keep his body I will inform u again.

[10] At the police station PW26 met the investigating officer (IO) DSP Thiew Hock Poh ('PW38') who told her that the police would take action if there was a demand for ransom. PW38 gave his contact number to PW26. Upon returning home, PW26 checked the deceased's laptop and saw a photograph of Dolphine. She discovered that Dolphine was a male and was one of the deceased's internet friends. PW26 said that she did not know Dolphine.

[11] On 24 April 2007 based on the deceased's bank statements, PW26 called the banks instructing them to stop honouring the use of the deceased's credit cards but was informed that transactions were still being made with the cards. About 11pm, PW26 received a message asking her to get ready with cash in the sum of RM200,000. She informed PW38 about this demand.

[12] On 25 April 2007 PW26 received more messages from the deceased's handphone. One of the messages told PW26 to go ahead and lodge a police report if she wanted the deceased's body to be delivered by instalments. About 10am the same day, PW26 together with her father Teh Eu Choon ('PW32') and Eng Chee Yang, who was her boyfriend then, met with PW38, DSP Mohamad Mansor bin Mohd Nor ('PW36'), who was the Acting Head of the Criminal Investigation Department at the material time, C/Insp Tan Chun Kim ('PW30') and other police personnel for a discussion. At the meeting they were told that PW30 would be the liaison officer between them and the police. Later PW30 gave to PW26 a book (exh P18A) and asked PW26 to record all messages and other related information in the book.

[13] On the morning of 26 April 2007, PW26 received a message demanding RM200,000 for the deceased's return. PW26 replied asking for a video recording to show that the deceased was still alive. She then received a reply which she recorded in exh P18A which reads:

> I did not hurt him but I got no money to buy food for him, Tuesday till now he had no food to eat and I don't know how long he still can hold.

PW26 replied asking for a video recording of the deceased. A reply came saying that it would be sent later but PW26 had to transfer RM5,000 first into the deceased's bank account to buy food for the deceased. PW26 was also told to prepare RM200,000 ransom money in used RM100 notes and the numbers of

the notes should not be in sequence. The money was to be paid by 4pm the next day. PW26 asked for the deceased's bank account number. She received the deceased's bank account number together with a demand for RM5,000 to be transferred by 1pm. About 2pm PW26 deposited RM2,000 cash (exh P18F(1)) at Maybank Klebang branch and sent a message to the deceased's handphone informing about the deposit. She stated that since it was a public holiday she could not withdraw money. About 6.42pm PW26 received a message asking her to get the RM200,000 ransom money ready by 4pm the next day.

[14] On 27 April 2007, about 10.20am, PW26 received a message that half of that amount should be paid first. Then at about 11.54am she was asked to deposit RM4,000 into the deceased's account by 1pm. PW26 later deposited another RM4,000 into the deceased's bank account at Maybank Klebang branch (exh P18F(2)). She then sent a message to the deceased's handphone informing about the deposit. PW26 then asked for a video of the deceased. About 5.34pm she received a message giving the web address where she could see a video of the deceased but she was not able to download the video because she did not have the software. She was asked to search for the software herself. She was also told that if payment was not made, the next day would be the deceased's last day.

[15] PW26 managed to find a software on the internet which enabled her to see the video that she had downloaded earlier. She said she could identify that the person in the video was the deceased from the shape of his face and hair. She saw the deceased's face covered all over with black tape except for the nostrils. Around his neck was a yellow coloured string. The deceased was sitting on a wooden chair and in the background she saw a window. Having watched the images on her laptop, PW26 downloaded the images into two CDs (exhs P134E and 134G). She kept the CDs untill 5 May 2007 when she handed them over to PW38. Both PW38 and PW26 watched the CDs on a laptop that PW26 had brought with her. PW38 saw that the deceased was tied to a wooden chair.

[16] On 28 April 2007, PW26 deposited RM6,000 (exhs P18F(3) and (4)). PW26 was supposed to pay another RM20,000 the next day. She complied. On the night of 29 April 2007 PW26 followed the instructions given through the deceased's handphone regarding the location where the ransom money was to be dropped off. However during her journey, the caller kept changing his instructions which caused PW26 to drive to various locations (pp 1618–1619 appeal record *Jld* 2i). In the end the calls stopped and no drop off was made. PW26 returned home and reached her house about 5am. There was no further contact from the kidnapper.

[17] On 29 April 2007, about 2.20pm, Hussain bin Ahmad ('PW3') had gone to a rubbish dump site at Jalan Felda Lasah, Sg Siput, where he normally disposed off rubbish. He had gone to the site for the same purpose two or three days before 29 April 2007 but had not seen anything. On 29 April 2007 PW3 saw a body lying on its side wrapped in a blue coloured cloth and tied with raffia string. He then proceeded to Lintang Police Station which was about an hour's journey away. At the police station, PW3 met L/Cpl Muhammad Khairizal bin Masri ('PW4) and he told PW4 what he had seen. PW4 then reduced the information into Lintang Report 134/07 (exh P13).

[18] Supt Judy Blacious a/l Pereira ('PW17'), who was the head of the Criminal Investigation Division for the Sg Siput Police District at the material time, together with his men proceeded to the site where he saw the body lying on its left side wrapped in a blue coloured cloth (exh P84A) tied with raffia string (exh P85A). PW17 then instructed L/Cpl Mohd Zaman bin Jusoh (PW2) to take photographs (exh P11(1–11)).

[19] Dr Mohammad Shafie bin Othman @ Osman (PW18), who was the head of the Department of Forensics at the Raja Permaisuri Bainun Hospital, Ipoh, was also notified about the finding of the body. He arrived at the site about 6.45pm. He testified that the body was wrapped with blue coloured cloth. The face was covered with maggots. The legs, thighs, waist and chest were tied with yellow coloured raffia string. PW18 requested the police to send the body to Sg Siput Hospital for a post-mortem examination.

[20] PW38 was instructed by PW36 to take PW26 and her father PW32 to the Sg Siput police station. PW36 informed both PW26 and PW32 that a body had been found in Lintang and had been sent to the hospital. PW36 and PW38 together with PW17 then took PW26 and PW32 to the hospital where PW32 identified the deceased's body.

[21] The post-mortem examination was conducted by PW18 who then prepared the post mortem report (exh P94). The report showed that the deceased suffered numerous external and internal injuries.

[22] PW18 testified as follows (p 403 appeal record):

> Pemeriksaan menunjukkan simati telah mengalami kecederaan tulang muka yang menyebabkan pendarahan mengalir masuk ke salur pernafasan dan seterusnya ke dalam paru-paru, Keadaan ini telah menyebabkan simati mengalami kesukaran bernafas sekaligus membawa kepada kematiannya.
>
> Kecederaan muka yang dialaminya adalah berpunca dari hentakan objek tumpul menggunakan kudrat yang kuat. Objek tumpul di sini bermaksud apa-apa objek yang tumpul seperti batu, kayu, besi dan mungkin juga tumbukan tangan dan tendangan kaki.

Further in his testimony PW18 said:

> Kecederaan dalam item 2 (see page 1564 appeal record) dilihat telah menyebabkan keretakan pada dasar tengkorak sebelah kiri. Daya yang digunakan sehingga menyebabkan keretakan tengkorak adalah kuat.
>
> Kesan lebam item 3 & 4 adalah berpunca dari hentakan suatu object tumpul dan keras contohnya adalah seperti yang sebut di atas.
>
> Kesan kecederaan item No 4 didapati telah menyebabkan kecederaan dalaman iaitu tulang hidung dan rabung hidung mata pecah.
>
> Dari pemeriksaan dalaman, kepatahan ini telah menyebabkan rongga udara tulang muka dipenuhi darah. Selain itu pendarahan ini juga telah masuk ke dalam salur pernafasan dan seterusnya ke paru-parunya.
>
> Daya kekuatan yang digunakan sehingga menyebabkan kepatahan tulang muka tersebut adalah kuat.

PW18 further testified as follows:

> Tanda-tanda bintik-bintik pendarahan pada permukaan paru-paru adalah bersesuaian simati mengalami sesak nafas sebelum kematiannya.
>
> Kesesakan nafas boleh dikaitkan dengan kecederaan tulang muka yang menyebabkan pendarahan mengalir masuk ke salur pernafasan dan seterusnya ke paru-paru. Keadaan ini telah menyebabkan simati mengalami kesukaran bernafas dan sekali gus membawa kepada kematian.

The cause of death was 'kecederaan muka disertai dengan aspirasi darah'.

[23] PW18 estimated that death had occurred between 12–36 hours prior to the discovery of the body. PW18 handed the blue coloured cloth that was used to wrap the deceased's body and the yellow raffia string used to tie the body to PW17 who then later handed them over to PW38.

[24] The police asked PW26 about the deceased's handphone (exh P19A). PW26 found a Nokia N70 bag (exh P18B), a box (exh P18C) containing a warranty card (exh P18D) and a purchase receipt (exh P18E) in the deceased's room. She confirmed the ID number of the deceased's handphone from exh P18C. On 29 April 2007 PW26 handed over the items to PW30 who in turn handed over the items to PW38.

[25] Yip Leong Fei ('PW8') was a handphone salesman at Jusco Ipoh. PW8 confirmed that on 17 April 2006 he sold exh P19A to the deceased. According to PW8, each Nokia handphone can be identified from the last four digits of its ID number. The last four digits of the ID number of exh P19A was 1635. PW8 had issued a receipt to the deceased (exh P18E). PW8 wrote the ID No 1635 on exh P18E. He obtained the deceased's particulars from his identity card. The warranty card for exh P19A bore the No 107266 (exh P18D). The deceased had purchased the handphone on an instalment plan using a credit card issued

in his name (exh P17). The payment instructions to the bank (exh P20) were signed by the deceased and witnessed by PW8.

[26] Regina a/p Arokiam (PW33) was a senior executive at Maxis Mobile Sdn Bhd. PW33 handled requests from the police for particulars of accounts holders and itemised bills. PW33 had processed a request from the police for itemised bills for handphone No 0125226543, which was the deceased's handphone number, for the period from 14 March–13 April 2007 and from 14 April–13 May 2007 (exhs P145 and P146). Exhibit P146 which is the account statement for the deceased's handphone showed that on 21 April 2007 about 2.30pm one message was sent to the handphone of PW26 (p 1698 appeal record). From 23–29 April 2007 numerous messages were sent from the deceased's handphone to PW26's handphone with the last message sent on 29 April 2007 at 3.57am (pp 1699–1702 appeal record).

[27] The IO PW38 testified that he had investigated the credit cards owned by the deceased and found that the deceased had two Visa credit cards. Investigations revealed that on 21 April 2007 and 22 April 2007 the deceased's Visa credit card No 4539660002142522 had been used at Jaya Jusco Ipoh.

[28] Syafarizal bin Mohd Mahdi ('PW11') was a camera sales promoter at Jaya Jusco Ipoh at the material time. On 21 April 2007 about 3pm he had attended to a male Chinese customer who had wanted to buy a Sony handycam and a Canon printer. PW11 identified the customer as the second appellant. The second appellant wore a black cap and a faded blue jacket. The second appellant bought the Sony handycam bearing serial No 553876 (exh P29B) which cost RM2,199 and the Canon printer which cost RM599. The second appellant also bought photopaper which cost RM74.50. The total cost was RM2,872.50. PW11 wrote a cash memo (exh P28B) and took the cash memo and the items purchased to the cashier, Nor Akma Raihah bt Hamdan (PW12) followed by the second appellant. PW12 processed exh P28B as evidenced by her ID No 189952 which was printed on exh P28B. The second appellant paid for the purchases with a credit card with the No 4539660002142522 in the name of the deceased. The second appellant signed the credit card purchase slip (exh P28A) and PW12 then handed over the items purchased to him. PW12 then handed over exh P28A to the Accounts Department.

[29] The following day ie on 22 April 2007 about 5.30pm PW12 again attended to the second appellant. She testified that she could recognise the second appellant because he was wearing the same black cap and faded blue jacket that he had worn the previous day. The second appellant wanted to pay for some computer parts and a teddy bear (exh P31A). PW12 processed the cash memo (exh P28D). The second appellant again paid for the items using the same credit card and signed the credit card slip witnessed by PW12

(exh P28C). Two electronic journal reports relating to the purchases made on 21 April 2007 and 22 April 2007 (exhs P28E and P28F) show that the payments for the purchases on both dates were made with the same Visa credit card with the No 4539660002142522. The time of the transaction on 21 April 2007 was recorded as 3.23pm and the time of the transaction on 22 April 2007 was recorded as 5.30pm.

[30] On 9 May 2007, PW38 obtained a printout of the statement of the deceased's bank account for the period 27 April–9 May 2007 (exh P124) from Chen Phek Cheow (PW21) who was the assistant manager of the Maybank branch at Sg Siput where the deceased was a customer.

[31] PW21 testified that exh P124 showed that on 27 April 2007 at 1.08pm a deposit of RM4,000 was made into the deceased's account through the Maybank Klebang branch cash deposit machine (exh P18F(2)). The next day on 28 April 2007, three withdrawals were made from the deceased's account at the same Maybank Sg Siput branch through the ATM machine. The first withdrawal was made at 11.44am. The second withdrawal was made at 11.45am and the third withdrawal was made at 11.46am. Each withdrawal was for RM1,500. The total amount withdrawn was RM4,500. On the same day, two deposits of RM4,950 (exh P18F(3)) and RM1,050 (exh P18F(4)) totaling RM6,000 were made into the deceased's account through the Maybank Klebang branch cash deposit machine at 1.17pm and at 1.20pm respectively.

[32] PW38 also obtained from PW21 a CCTV recording in relation to the three withdrawals (exh P134B). The recording showed that the three withdrawals were made by a person who wore a black jacket and a cap which covered his face from view.

[33] On 1 May 2007 about 3am Supt Shahadan bin Jaafar ('PW19') arrested the first appellant. On the same date about the same time ASP Somu a/l Subramaniam ('PW20') arrested the second appellant.

[34] PW19 led a police party to a house located in Kg Bharu, Mambang Di Awan, Kampar, Perak in relation to the report lodged by PW26. The gate to the house was locked and there was a Honda Civic motorcar bearing registration No ABX 7866 (exh P34) under the porch.

[35] PW19 saw the silhouette of a man entering a room in the house. The police broke down the locked front door and entered the house and PW19 went to the room he had seen the man enter earlier. PW19 opened the room door and he found the first appellant inside the room.

[36] The first appellant was arrested and PW19 conducted a search of the room. PW19 seized the following exhibits found inside the room (exh P109):

(a) a Nokia N70 handphone (identified as the deceased's handphone) (exh P19A);

(b) a wallet (exh P108A);

(c) the wallet contained the first appellant's identity card (exh P108A(1)) and cash amounting to RM671 (exh P108A(2));

(d) five other handphones (exhs P96A, P97A, P98A, P99A and P103A);

(e) a Sony camera with the serial No 8289005 (exh P100A);

(f) a Kingston thumb drive (exh P102A);

(g) an MP4 (exh P104A);

(h) cash amounting to RM4,500 (exh P108B);

(i) a Sony handycam with the serial No 344246 (exh P101A);

(j) a pair of 'Asadi' slippers (exh P106A); and

(k) a pair of 'Miki Paris' sunglasses (exh P105A).

[37] The deceased's handphone was found hidden underneath a mattress in the room. The four handphones and the Sony camera were found on a table. Another handphone together with the Sony handycam, the Kingston thumb drive, the MP4 and the sunglasses were found inside a cupboard. The first appellant's wallet together with the RM4,500 cash were found in a drawer of a table in the room. PW19 also seized the Honda Civic car (exh P34). The key to the car (exh P107A) was recovered from the first appellant.

[38] PW19 took the first appellant and the exhibits seized to the Ipoh police headquarters. He lodged a police report (exh P95). PW19 had been given a copy of the police report (exh P13) by PW17. PW19 found that the deceased in exh P13 and the victim in exh P132 was the same person. He then instructed PW38 to investigate the two related reports. He handed over the first appellant and the exhibits seized to PW38 (exh P114).

[39] PW20 led a police party to a double storey terrace house at No 23, Kampar Avenue, Kampar. Parked in front of the house was a red Nissan Sunny motorcar bearing registration No AAS 9476 (exh P14). In a room on the upper floor of the house PW20 saw the second appellant and a girl (PW34) who PW20 suspected to be the second appellant's girlfriend.

[40] PW20 seized from the second appellant, amongst others, the following exhibits (see exh P113):

(a) a Nokia handphone model 1100 (No 016-3669321) (exh P115A);

(b) a Sony Ericsson handphone model K5101 (No 016-5145369) (exh P116A);

(c) a Sony Ericsson handphone model Z5301 (No 016-5002018) (exh P117A);

(d) a Nissan Sunny car (registration No AAS 9476) (exh P33);

(e) keys to the Nissan Sunny car (exh P118A);

(f) the car's registration card (exh P119A(1);

(g) the car's insurance policy (exh P119A(2); and

(h) a wallet (exh P120A).

[41] PW20 found the following exhibits inside the second appellant's wallet:

(a) the second appellant's identity card (exh P120A(1));

(b) his driving licence (exh P120A(2));

(c) a receipt dated 21 April 2007 in the name of the deceased issued by 'The Store 203 Jalan Kampar' for the sum of RM180.66 (exh P120A(4)) which was paid for with the deceased's MBB Visa card No 4539660002142522. The transaction time was '12.07'; and

(d) a Sony Cybershot camera serial No 2283599 (exh P122A) inside the glove compartment of the Nissan Sunny car.

[42] PW20 arrested the second appellant and took him together with the exhibits seized to the police headquarters where PW20 lodged a police report (exh P112) and prepared a search list (exh P113). He then handed over the second appellant and the items seized to PW38 (exh P114).

[43] On 4 May 2007 pursuant to interrogation, the first appellant led PW38 and a police party to a house at No 2, Jalan Bercham Utama 17, Taman Utama Bercham, Ipoh (the Bercham house). The owner of the Bercham house was one Tham Chui Wan, who is a daughter of Tang Wah Yau @ Tham Weng Yau ('PW6'). According to PW6, Tham Chui Wan stays in Singapore. In her absence, he managed the house.

[44] PW6 testified that on the morning of 9 April 2007 he had gone to the house upon being informed by his son that someone was interested to rent the house. PW6 was accompanied by his daughter, Tham Choy Lin ('PW7'). At the house he met both the appellants who came in a red coloured car. At 2 pm on the same day PW6 and PW7 met both appellants again at the house to finalise the rental. He had rented out the house to the two appellants at RM280

per month. The first appellant paid to PW6 RM760 being one month's deposit and one month's rent and RM200 as deposit for utilities. The rental agreement was prepared by PW7. Both the second appellant and PW7 signed the agreement. The second appellant wrote his name and identity card number on the agreement. PW6 handed over a set of house keys to the first appellant. The house was unfurnished except for a fan. At an identification parade PW6 identified both appellants as the persons who had rented the house.

[45] The Bercham house was the last house in a row of single storey terrace houses. The house immediately next to the Bercham house was occupied by Thiyagarajan a/l Telaganu ('PW5'). According to PW5 in April 2007 the Bercham house was rented by the two appellants. He said he realised that the two appellants were occupying the house when he saw them carrying boxes into the house. The boxes were transported in a red coloured Nissan Sunny car. PW5 stated that he had spoken to the appellants once to tell them that the car headlights had not been switched off. The second appellant came out of the house to switch off the headlights. As far as PW5 was aware, in April 2007 only the two appellants occupied the Bercham house.

[46] PW38 opened the front gate of the Bercham house with one of the keys recovered from the Honda Civic car (exh P34) that was seized from the first appellant's house. PW38 used the other keys to open the grille and glass doors of the house. PW38 together with ASP Ooi Chiew Peng ('PW15') entered the house. PW38 instructed PW15 to collect exhibits found in the house.

[47] Among the exhibits collected from the Bercham house and marked by PW15 were as follows:

(a) a wooden baton (exh P50A);

(b) an eight inch stainless steel knife (P51A);

(c) a bunch of keys (P52A);

(d) a plastic sheet with blue and white stripes (exh P53A);

(e) a red bucket (P54A);

(f) three receipts from Petronas (exh P57B(1–3));

(g) one receipt from Alliance Bank (exh P57C);

(h) two receipts from HSBC (exh P57D(1–2));

(i) three receipts from Maybank (exh P57E(1–3));

(j) a receipt from Tejani Medical Services Sdn Bhd in the name of the deceased (exh 57F);

(k) a piece of black coloured tape (exh P58A);

(l) a piece of red coloured tape (exh P59A);

(m) a pair handcuffs and key (exh P60A);

(n) a yellow coloured raffia string (exh P62A);

(o) a roll of blue cloth (exh P27B);

(p) a medium sized white towel (exh P63A);

(q) a plastic bag containing a pink coloured face towel (exh P64B) and a pair of 'Mizuno' brand shorts (exh P64C);

(r) two wooden chairs (exhs P21A and P21B);

(s) four cushions (exhs P22B(1), P22B(2), P24B1 and P24B2);

(t) cushion covers (exh P22B(1), P23A, P25A and P26A);

(u) blood stains on the wall in the third bedroom (exh P65A);

(v) a blood stained flower patterned curtain in the third bedroom (exh P66A);

(w) an empty Coca Cola bottle (exh P67A) with traces of finger prints;

(x) strands of hair found on the floor of the living room, the three bedrooms and the kitchen (exhs P69C, 70C, 71C, 72C and 73C); and

(y) a bunch of keys found hanging on a wall of the house (exh P106A).

In her testimony PW26 identified the Mizuno shorts (exh P64C) as belonging to the deceased.

[48] The first appellant then led PW38 and his team to the recovery of the deceased's car parked in a lane behind a factory located in an industrial area in Bercham. The location was about ten minutes' drive from the Bercham house. The car was locked. PW38 found the car key from among the bunch of keys that were earlier seized from the Bercham house. The car was taken to the police headquarters. PW38 and his team together with the first appellant also returned to the police headquarters. PW38 then lodged two police reports (exhs P151 and 152).

[49] On 10 May 2007 the second appellant brought ASP Muniandy a/l Paramichivan (PW24) to the house at Kampar Avenue again. In the house the second appellant entered a room and took a bag which he handed over to PW24. Inside the bag PW24 found a Sony handycam serial No 553876 (exh P29B). This was the handycam that PW11 said he had sold to the second appellant on 21 April 2007.

[50] The second appellant then led PW24 and the police party to the house of his girlfriend, Lee Kar Lai ('PW34') in Simpang Pulai. At this house the second appellant spoke to PW34 in Chinese. PW34 then went into the house. She came out and handed a teddy bear (exh P31A) to PW24. This was the teddy bear that PW12 said the second appellant had bought on 22 April 2007.

[51] Inspector Ameyrudin bin Ahmad Zuki ('PW37') was an assistant analyst in the audio, video and photo section at the PDRM Forensics Laboratory. His duty was to analyse electronic and telecommunication equipment such as mobile phones, computers and CCTV. On 8 May 2007 PW37 received from PW38 34 exhibits (exh P148). All the exhibits were registered with the No 07F0379 being the lab number and MFSAVF84/05/07 being the audio video section number.

[52] PW37 analysed the deceased's handphone and the multimedia card (MMC) retrieved from the handphone. PW37 extracted from the handphone data such as sms, phone book and outgoing and incoming messages. The data extracted from the deceased's handphone shows the series of messages sent and received including the messages purportedly sent on 29 April 2007 to PW26 giving her instructions on where to drop off the ransom money. PW37 extracted a total of 115 incoming messages, 88 outgoing messages and one SMS message in the Outbox. The data retrieved from the MMC (exh P19B) shows a video of a man who appeared to be without clothes on and who was blindfolded with black tape. There was a yellow coloured string around his neck. PW37 printed a still photograph of the man (pp 1695–1604 of appeal record). He then transferred the video in the MMC to his computer and he then transferred the video to a CD. On the CD PW37 wrote Chemor report No 886/07 and the lab number. He kept the CD which he later tendered in court (exh P149). PW37 prepared a report of the results of his analysis of the exhibits (exh P125).

[53] On 16 May 2007 PW38 handed over the exhibits recovered from the Bercham house to the chemist, Muhamed Zaini bin Abdul Rahman ('PW29') for analysis. PW29 prepared a report (exh P143). His report shows that the following exhibits bore stains indicative of human blood:

(a) the piece of blue cloth (exh P27B);

(b) the knife (exh P51A);

(c) the handcuffs (exh P60A);

(d) the yellow raffia string 67cm in length (exh P62A);

(e) the towel (exh P63A);

(f) the Mizuno shorts (exh P64C);

(g) the cushion cover (exh P23A);

(h) two cushions (exh P25A and P25B);

(i) the cotton swab bearing blood stains (exh P65A); and

(j) the curtain (exh P66A).

The human hair samples were similar to the hair specimen of the deceased.

[54] Apart from that, PW29 also found that there was a complementary fit between the blue cloth exh P27B and the cloth exh P84A which was used to wrap the deceased's body. PW29 requested the exhibits to be submitted to the Chemistry Department at Petaling Jaya for DNA analysis.

[55] PW38 handed over to the chemist Nur Azeelah bt Abdullah ('PW27') 25 exhibits (exh P136) for DNA analysis. PW27 found the deceased's DNA on the following exhibits:

(a) knife;

(b) handcuff;

(c) yellow raffia strings;

(d) three cushion covers;

(e) pink towel;

(f) human hairs labelled as 'T40'–'T43', and

(g) cotton swab.

PW27 also found the second appellant's DNA on the human hair exhibits labelled as 'T40', 'T41' and 'T42'. On 30 October 2007 PW27 handed over all the exhibits and her report (exh P137) to PW38.

[56] With regard to the blue coloured cloth that was recovered from the Bercham house (exh P27B), the prosecution had called Yeong Kin Hin ('PW10') who was a supervisor at Ren Ai Buddhist Association, Ipoh ('association') at the material time. The association collects items donated by the public which are then sold.

[57] According to PW10, the first appellant was also a supervisor at the association. Both PW10 and the first appellant worked in the association's Recycle Department. Only three persons held the keys to the Recycle Department and the first appellant was one of them. PW10 identified exh P27B as belonging to the association and stored at the Recycle Department.

[58] PW10 testified that in early April 2007, the second appellant had come to the association to buy furniture. The second appellant bought a mattress, two wooden chairs (exhs P21A and 21B) with four cushions (P24(B1–4)) with yellow coloured covers (exhs P22B, P23A, P25A and P26A) and a blue coloured sofa. The second appellant gave PW10 his handphone number and asked for the items to be delivered to Bercham.

[59] On 12 April 2007 PW10 gave the second appellant's contact number to Wei Fook Leong ('PW9'), who worked as a driver at the association and asked PW9 to deliver the items. Upon reaching Bercham, PW9 contacted the second appellant and gave his lorry number to the second appellant. The second appellant came to meet PW9 in a red Nissan Sunny car. The second appellant led PW9 to the Bercham house which was about five minutes away from where PW9 had waited for the second appellant. Upon arrival, the second appellant opened the gate and asked PW9 to unload the items inside the house compound.

FINDING AT END OF PROSECUTION CASE

[60] At the end of the prosecution case, the trial judge found that the prosecution had established a prima facie case that the two appellants had, in furtherance of a common intention, kidnapped and subsequently murdered the deceased. Both appellants were called upon to enter on their defence.

[61] Although this appeal concerns only the second appellant, for the sake of completeness we find that it is also appropriate to set out the defence of the first appellant.

[62] The appellants' defence shared some common features. Both admitted that they had rented the Bercham house for the purpose of their business of repairing and servicing of computers. Both denied going to the Bercham house during the period from 20–29 April 2007 because according to the first appellant, during that period there was no order from their clients to repair computers. Both put up the defence of alibi. It was contended that the perpetrator of the crimes against the deceased was most probably Dolphine because during the material period Dolphine had access to the Bercham house. Essentially both the appellants denied any involvement in the commission of the offences.

DEFENCE OF THE FIRST APPELLANT

[63] The first appellant had known the second appellant since 2003. In 2006 the second appellant became his business partner. Before that the second

appellant had no fixed job. The Bercham house was rented for his business. His mother did not know about the Bercham house.

[64] The first appellant admitted that he had known Dolphine since 2005 through the internet. Dolphine was his close friend. He had introduced Dolphine to the second appellant.

[65] Sometime in December 2006 Dolphine had introduced the deceased to him. Both Dolphine and the deceased were his clients. They would send their computers for servicing and repairs to his house in Kampar and not to the Bercham house. According to the first appellant, the second appellant helped him to service and repair computers at the Bercham house but they did not stay overnight at the house.

[66] On 18 April 2007 Dolphine came from Penang and had requested to use the Bercham house because he did not want to stay in a hotel. The second appellant was present. The first appellant said he gave to Dolphine the only set of keys to the Bercham house. Dolphine returned the keys to him on 29 April 2007 at the association.

[67] The first appellant lived at his house in Kampar with his mother Fong Ngan Thai ('DW3') who was a Chinese physician. He would help his mother in the house and take her to the association or to other places to treat patients. The first appellant gave a detailed account of his activities during the material period, including the places he had gone to with his mother and the types of treatment that his mother had administered on her patients and the time spent at these places.

[68] According to the first appellant, every Monday after dinner he would go to play badminton with his friend for about two hours from 8–10pm. On the nights of 24, 25 and 26 April 2007 he had attended night classes. He also recalled that on 25 April 2007 he had gone to the house of a client, one Mr Yong, to service the client's computer which had been infected with a virus. He said he had spent about 1 1/2 to two hours at the client's house to format the hard disc and reinstall the Windows system. Then he went home. He had a bath and dinner at home with his mother and then he went for his night class.

[69] The first appellant admitted that since 2003 or 2004 he was head of the Recycle Department at the association. Between 21–29 April 2007 he had gone to the association only once regarding his work there. On 27 April 2007 he was at the association from 3–5pm.

[70] In respect of the deceased's handphone, the first appellant stated that on 29 April 2007 when Dolphine returned the keys to the Bercham house,

Dolphine had given him the handphone to keep and said he would come back to collect it later. Dolphine said he had bought the phone from someone. Dolphine had also given him a box containing a doll to be passed to the second appellant. The second appellant came to collect the box later that day. The first appellant denied sending any messages to PW26 using the deceased's handphone or sending any video clip of the deceased to PW26.

[71] The first appellant admitted that the knife (exh P51A) that was recovered from the Bercham house belonged to him. He said that the blue cloth (exh P27B) was used to wrap the computers. The plastic string (exh P62A) was used to tie the computers when he delivered the items back to his clients.

[72] He admitted that the cushion covers (exhs P23A, P25A and P26A) were for the furniture in the house but denied that there were any stains on them when he left the house on 17 April 2007. He denied knowledge of the baton, handcuffs, towel, receipts and Mizuno shorts. He denied making any withdrawal from the deceased's bank account.

[73] With regard to the deceased's car, the first appellant said that when Dolphine handed him the house keys, Dolphine had told him that the car was parked in the industrial area for servicing. But he did not know that the deceased's car keys were in the Bercham house.

[74] In cross-examination the first appellant provided details on Dolphine. But the first appellant did not know Dolphine's full name. When the first appellant got to know Dolphine in 2005, Dolphine was 16 years old. Dolphine had studied in Malim Nawar, Kampar. He stayed with his grandmother. His parents were divorced. Then Dolphine moved to Penang to study. In 2007 Dolphine was staying in Penang. The first appellant estimated that in a month he would exchange about 30 SMS messages with Dolphine. He would meet Dolphine about ten times a month. They would chat on the internet about three times a week. Each time their chat would last for roughly two hours.

[75] The first appellant's mother, Fong Ngan Thai ('DW3') was called as his alibi witness. DW3 gave a detailed account of her daily activities with the first appellant on each day between 20–29 April 2007. She however conceded that she would not know whether the first appellant had gone to the Bercham house at any time during that period.

DEFENCE OF THE SECOND APPELLANT

[76] The second appellant stated that the first appellant was his friend and that since 2006 he had helped the first appellant to repair computers. He would take the computers to repair them at his own house. The first appellant would pay him for his services.

[77] The second appellant admitted that he had signed the tenancy agreement for the Bercham house but the first appellant had paid the rent. The first appellant had told him that it was cheaper to rent a house for their business since they did not have many clients and computers to repair. The first appellant would take computers to the house. The first appellant held the key to the Bercham house. The first appellant would arrive at the Bercham house earlier than he. The computers that had been repaired would be wrapped in the blue coloured cloth and tied with strings before being sent back to their owners. The cloth and string and the wooden baton were brought to the house by the first appellant. On 17 April 2007 the first appellant had delivered the last computer that he had serviced. After 17 April 2007 he had not gone to the Bercham house.

[78] The second appellant denied knowing the deceased. He admitted that he knew Dolphine since 2006 through the first appellant. He had never met Dolphine except together with the first appellant. He said that Dolphine was similar in build to him and had always worn a cap. On 18 April 2007 he and the first appellant had met Dolphine about 5pm for drinks. He was present when the first appellant gave the house key to Dolphine. The first appellant had told him that Dolphine wanted to use the house.

[79] The second appellant denied having gone to Jaya Jusco Ipoh between 20–29 April 2007 or buying anything there during that period.

[80] With regard to the teddy bear (exh P31A) and the handycam (exh P29B) that was recovered from him, the second appellant said that he had asked Dolphine to buy the items because Dolphine had some bonus points which could be used and had volunteered to buy the items. Dolphine had passed the teddy bear and the handycam to the first appellant and on 29 April 2007 about 12.30pm he had gone to the association to collect the two items from the first appellant.

[81] With regard to the receipt from 'The Store' (exh P120A(4)) the second appellant said that it came with the teddy bear. He said that he had kept the receipt because he had intended to pay Dolphine for the teddy bear. Then he took his girlfriend ('PW34') to Taiping. After returning from Taiping, he gave the teddy bear to PW34. The second appellant stated that he did not own any

credit card and did not know how to use them. Between 20–29 April 2007 he had not made any withdrawal from any bank.

[82] The second appellant testified that he lived with his parents, sister and uncle at the house in Kampar Avenue. He gave a detailed account of his daily activities during the material time. His sister Yan Chooi Lay ('DW4') and his mother, Ng Ah Kwai ('DW5') were called as his alibi witnesses. He said that DW4 had worked as a promoter but had not worked since 31 March 2007 and was at home most times. His mother worked as a cleaner in a restaurant from 8am–6pm.

[83] DW4 testified that from January–March 2007 she had worked in a restaurant but had stopped work in March 2007. She had started working again in April 2007 but could not remember the date. According to her, she was at home most days in April 2007. In April 2007 on the days when she was not working, she saw that the second appellant had gone to work from 8am or 9am and would return home about 7 or 8pm.

[84] DW5 worked in a restaurant from Monday to Saturday from 6am–5pm. DW5 said that DW4 had health problems since the age of 16 years. DW5 described DW4 as 'Otaknya tidak pandai dan otaknya lembab'. DW5 said that DW4 had stopped work at the end of March 2007. In April 2007 DW4 did not work. She started working again in May 2007.

[85] According to DW5 in April 2007 the second appellant would usually repair computers at home. Most times the second appellant would bring home the computers. She knew that the second appellant also repaired computers elsewhere.

[86] Like the first appellant's mother, DW5 gave a detailed account of her daily activities and an account of the movements of the second appellant from 21–29 April 2007. On 21 April 2007 she had gone to work at 8.30am. She returned home at 5.30pm and saw that the second appellant was at home.

[87] Generally the evidence of DW5 was that when she left for work, the second appellant was at home. When she returned from work the second appellant was also at home. If the second appellant left the house at night, it was only for about half an hour. When she went to bed about 10pm, the second appellant was still up.

FINDING AT THE CONCLUSION OF THE TRIAL

[88] The trial judge found that the defence case had failed to create any reasonable doubt in the prosecution case and that the prosecution has proved its case against both appellants in respect of the two charges beyond reasonable doubt.

[89] In respect of the first appellant, the trial judge found that the detailed and precise accounts given by the first appellant and his mother of the events that took place on each day from 20–29 April 2007 were highly unbelievable given the fact that they did not keep any record of their activities on those days which occurred five years earlier.

[90] The trial judge did not accept the reason given by the first appellant as to why he did not go to the Bercham house during the relevant period. His Lordship found it strange that from 20–29 April 2007 the first appellant did not receive any order to service or repair computers.

[91] As regards the evidence of the first appellant's mother, His Lordship found that it had to be treated with the greatest caution since she was not an independent witness. The judge found that the defence of the first appellant was a mere denial of his presence at the Bercham house from 20–29 April 2007.

[92] With respect to the second appellant, the trial judge found that his mother could not corroborate his evidence because she worked from 9am–5pm. Despite DW5's description of DW4 as being of simple mind, the trial judge found her to be a truthful witness.

[93] The trial judge found that the defence that Dolphine could have been the person who had committed the crimes was without merit because the first appellant did not inform the police about Dolphine at all. Neither did the first appellant inform the police at the first available opportunity that it was Dolphine who had given him the deceased's handphone and that Dolphine was the last person to use the Bercham house. The defence did not cross-examine any of the police witnesses on whether Dolphine was the main suspect. The neighbour to the Bercham house (PW5) was never asked whether he had seen a third party coming to the Bercham house during the material period.

[94] Consequent to his finding, both appellants were found guilty and convicted on both charges and both were sentenced to death on the said charges. The Court of Appeal agreed with the trial judge and the appellants' appeals against their convictions and sentences were dismissed.

A BEFORE THIS COURT

[95] Learned counsel for the second appellant elected to commence his submissions in relation to the second charge of murder.

B *Murder (second charge)*

[96] On the charge of murder, the gist of learned counsel's submissions can be summarised as follows:

C (a) the trial judge had failed to address his mind on what was the act that was said to have caused the injuries sufficient in the ordinary course of nature to cause death;

(b) the absence of DNA evidence or any other evidence shows that there was no causal link between the second appellant and the injuries that caused the deceased's death; and

D

(c) the presence of the second appellant's DNA on the hairs found in the Bercham house was insufficient to prove that he had murdered the deceased.

E

[97] On the first issue, the primary contention by learned counsel was that the trial judge had failed to properly evaluate the evidence of the pathologist PW18 which showed that he was uncertain as to what actually caused the death of the deceased. It was contended that the trial judge had failed to consider that the testimony of PW18 had left the cause of death open to several inferences.

F

[98] According to learned counsel, PW18 had agreed that the facial injuries could have been caused by a forceful fall on a hard surface or a fall on a blunt object. Therefore it was submitted that the deceased could have fallen and hit his head on the floor or on a blunt object in his attempt to flee. PW18 was also unsure whether the injuries were inflicted before or after death. Learned counsel further submitted that there were other injuries which may have contributed to the death of the deceased.

G

H

[99] It was further submitted that PW18 had not obtained the medical history of the deceased which may show that the death of the deceased could have resulted from other diseases like a weak heart, tuberculosis and asthma. Therefore the prosecution's case, which was built purely on circumstantial evidence, had collapsed because of the uncertainty surrounding the cause of death which was not dispelled.

I

[100] On the second issue, it was submitted that there was no DNA evidence or other evidence to link the second appellant to the murder of the deceased.

Learned counsel submitted that the trial judge had not directed his mind to the issue of DNA from unknown persons. Learned counsel referred to exh P137, the report by the chemist PW27, in which it was stated that DNA profiles were successfully developed on certain samples 'except from hairs T26, T27 and T44 and bloodstains on nail clippings T20 and T21, cloths T22 and T39 string T23 and shorts T35'. In cross-examination, PW27 had agreed with learned defence counsel that the hair samples could have come from any unknown person and the bloodstains on the nail clippings, cloths, string and shorts could also have come from any unknown person.

[101] According to learned counsel, the possibility that these DNA samples might originate from an unknown person was consistent with the defence of the second appellant that the DNA samples might belong to Dolphine and was fatal to the prosecution's case.

[102] On the third issue, it was submitted that the discovery of the second appellant's DNA from some exhibits recovered from the Bercham house was insufficient to prove that he had committed murder because the second appellant had been to the house to repair computers. But he was not present at the house during the material time.

Kidnapping (first charge)

[103] The following issues were raised in respect of the first charge.

INSUFFICIENCY OF EVIDENCE

[104] It was submitted that the circumstantial evidence was insufficient to connect the second appellant to the offence charged. Learned counsel submitted that in the absence of direct evidence the question remained whether the deceased was unlawfully detained or confined. The circumstantial evidence relied on by the prosecution could not prove this. According to learned counsel, there was no evidence to prove the fact that the deceased was detained against his will. There was no evidence to show that the second appellant had detained or confined the deceased or had taken the deceased to the Bercham house or knew that the deceased was taken to the Bercham house. No DNA of the second appellant was found on the handcuffs or cloths used to restrain the deceased which raised the likelihood that the second appellant played no part in the wrongful confinement or abduction of the deceased. There was no evidence that it was the second appellant who had made the ransom demands through the deceased's handphone. The trial judge failed to consider that no fingerprint or DNA of the second appellant was found on the deceased's handphone. The handphone was not in the second appellant's possession. No ransom money was recovered from the second appellant. Further the second

A appellant did not have the keys to the house. The keys had been given to Dolphine by the first appellant. There was also the possibility that the deceased was complicit and staged his own kidnapping with Dolphine to obtain money from his family.

B IDENTIFICATION EVIDENCE

[105] On this issue it was submitted that the trial judge had erred in accepting the dock identification of the second appellant by both PW11 and PW12 given the fact that the trial commenced about four years after the incident. Therefore C the identification of the second appellant by PW11 and PW12 was of little value and ought not to have been given much weight.

[106] Learned counsel submitted that the courts below had not properly addressed the issue that even if it was shown that the second appellant had D made purchases using the deceased's credit card, this did not prove that he was involved in the kidnapping and murder of the deceased.

ALIBI

E

[107] Learned counsel submitted that the trial judge had mistreated the evidence given by the second appellant and DW3 which had resulted in a grave misappreciation of the second appellant's defence, resulting in a miscarriage of justice. The trial judge was confused with the defence witnesses when, in his F judgment, he found that the evidence of DW3 had completely destroyed the defence of the second appellant when in fact DW3 was the alibi witness for the first appellant. Even if the reference to DW3 was a clerical error when the trial judge had actually meant DW4, learned counsel submitted that the trial judge had erred when he found that the evidence of DW4 had contradicted the G evidence of the second appellant. The trial judge had failed to explain how he arrived at his finding that the testimony of DW4 had completely destroyed the second appellant's alibi defence.

[108] It was submitted that there was no contradiction between the evidence H of DW4 and the second appellant. The evidence of DW4 corroborated the evidence of the second appellant because according to DW4, she had started work in April 2007 and during the time when she was not working, she saw the second appellant went to work. Hence she would not be able to give an account of the whereabouts of the second appellant when she was working.

I

COMMON INTENTION

[109] The essence of the submissions by learned counsel on this issue is that the prosecution had failed to prove the necessary ingredients under s 34 of the

Penal Code as there was no evidence to show a prior concert or prearranged plan involving the second appellant in respect of the offences. The presence of the second appellant's DNA on the hair samples recovered from the Bercham house did not necessarily show that the second appellant was present at the scene of the crime at the material time. Learned counsel submitted that the presence of the second appellant's DNA on the strands of hair and the fact that the house was rented by both appellants did not prove that the commission of the offences was in furtherance of their common intention.

FAILURE OF THE POLICE TO PROPERLY INVESTIGATE

[110] It was contended that the police had failed to properly investigate the alibi notice of the second appellant which had been served on the prosecution. The police had also not investigated Dolphine. Therefore it was submitted that the infirmities in the investigation process had deprived the second appellant of his right to a fair trial.

DOLPHINE

[111] Insofar as Dolphine was concerned, it was suggested that the offences could have been committed by Dolphine. Learned counsel submitted that Dolphine existed because PW26 had seen a photograph of him on the deceased's computer. It was submitted that the message sent on 29 April 2007 by the deceased through his handphone (p 1600 appeal record) which said amongst others 'So sad lo. Dolphin cheat my money n my love ...' confirmed the existence of Dolphine and suggested a strange relationship between the deceased and Dolphine. It was submitted that the failure of the prosecution to call Dolphine as rebuttal witness had created a gap in the prosecution's case and attracted the invocation of adverse inference against the prosecution.

[112] For the reasons stated above, learned counsel submitted that no pima facie case was established and prayed that the second appellant's appeals against convictions and sentences be allowed.

OUR DECISION

[113] We will first address the issues raised by learned counsel in respect of the murder charge.

Murder (second charge)

[114] Learned counsel submitted that the trial judge failed to direct his mind on what was the act that caused the injuries which resulted in the deceased's

death. In reply learned DPP submitted that PW18 had stated that the facial injuries were caused by 'hentakan objek tumpul menggunakan kudrat yang kuat'.

[115] We have perused the grounds of judgment of the trial judge. Having carefully read the judgment, we are unable to agree with learned counsel. The thrust of the defence submissions before the trial judge was that the evidence of PW18 had left the cause of death open to several inferences because PW18 had admitted in cross-examination that there were other injuries, not necessarily the facial injuries, that contributed to the deceased's death. In the third paragraph on p 5 of the post-mortem report, PW18 stated that the facial injuries could also have been caused by a forceful fall on a hard surface. Further, PW18 agreed that it was not possible to say whether the said injuries were inflicted before or immediately after death. His Lordship then set out the submissions made by the prosecution on the evidence of PW18. It was submitted that PW18 was of the opinion that 'hentakan dengan menggunakan satu batang cota (P50A) boleh menyebabkan kecederaan muka dan kecederaan dalaman' (p 44 of the same volume).

[116] We find that at the end of the prosecution case, the trial judge had stated his finding that, having considered and evaluated the evidence adduced, he accepted the evidence of PW18 that the cause of death was due to the facial injuries and aspiration of blood and the said injuries were sufficient in the ordinary course of nature to cause death as provided for in limb (c) of s 300 of the Penal Code.

[117] It is true that the trial judge did not specifically state the act that caused the facial injuries but, in our considered view, by accepting the evidence of PW18 on the cause of death, then by necessary implication the trial judge had also accepted the opinion of PW18 on what had caused the facial injuries. It is therefore not correct to say that the trial judge had failed to consider the issue of actus reus.

[118] We find from the report by PW18 that he was certain which injury had caused death and he was also certain what act had caused the injuries. This is what PW18 had stated:

> Kecederaan muka yang dialaminya adalah berpunca dari hentakan objek tumpul menggunakan kudrat yang kuat. Objek tumpul di sini bermaksud apa-apa objek yang tumpul seperti batu, kayu, besi dan mungkin juga tumbukan tangan dan tendangan kaki.

We find that what PW18 had left open was the manner or how the facial injuries were inflicted ie it could have been inflicted using 'batu, kayu, besi dan mungkin juga tumbukan tangan dan tendangan kaki'.

[119] Learned counsel had suggested that the facial injuries could have been caused by a forceful fall onto a hard surface or a blunt object. We have considered the testimony of PW18. We find that although PW18 had agreed in cross-examination that the injuries could have been caused in the manner suggested by the defence counsel, yet PW18 had not made any concession that the facial injuries suffered by the deceased were more likely sustained in the manner suggested by the defence. At the conclusion of his testimony, his finding that the facial injuries were inflicted by a forceful blow with a blunt object remained unchanged. The resultant bone fractures and internal bleeding caused blood to enter the airway. The deceased could not breathe and he died. On the evidence, the facial injuries were caused by a forceful blow or blows to the deceased's face. We agree with the learned judge that the act that caused the facial injuries came within the provisions of limb (c) of s 300 of the Penal Code.

[120] Learned counsel had further suggested that the death of the deceased could have resulted from other diseases like a weak heart, tuberculosis and asthma. Again we considered the evidence of PW18. His report shows that he did not find any indication that the deceased had suffered from any ailments or physical infirmities to suggest that the death of the deceased could have been due to other causes. On the contrary, we find that his report shows that the deceased was a healthy young man. Further, neither PW26 nor PW32, who are the deceased's close family members, were cross examined on the state of the deceased's health. No suggestion was put to either PW26 or PW32 that the deceased had suffered from asthma, tuberculosis or a weak heart which could have been the cause of death or which could have contributed to his death.

Kidnapping (first charge)

[121] In respect of the first charge, we have considered the evidence adduced by the prosecution through PW26, PW27, PW37 and PW18 respectively and we agree with the trial judge that the prosecution has proved that the deceased had been kidnapped for ransom.

[122] The testimony of PW26 regarding the messages that she had received from the deceased's handphone, the demand for ransom for the release of the deceased, the dire consequences threatened on the deceased if the demand was not complied with and the various instructions that she had received from the kidnapper were corroborated by the data extracted by PW37 from the deceased's handphone and the contents of the book exh P18A.

[123] Learned counsel submitted that there was no evidence to show that the deceased was detained against his will or was wrongfully detained. We do not agree. We find that there was ample evidence from the testimony of PW26, PW38 and PW37 that the deceased was restrained with his face wrapped with

black tape except for his nostrils and the yellow string around his neck. This evidence was not seriously challenged by the defence.

[124] The evidence adduced through PW18 and PW27 further confirmed the fact that the deceased was restrained. PW18 had testified that on the deceased's wrists he found 'kesan-kesan calar halus yang selari merangkumi kawasan selebar 1 cm pada kedua-dua pergelangan tangan. Kesan-kesan calar ini menyerupai kesan akibat digari'. Around the deceased's ankles PW18 found 'kesan-kesan calar yang melintang disertai dengan kesan lebam pada kawasan sekitarnya ... Bersesuaian akibat diikat/gari'. PW27, who had analysed the exhibits recovered from the Bercham house, found the deceased's DNA on the knife, handcuffs, yellow rafia strings, cushion covers, towel, human hairs and cotton swab. Thus, there was overwhelming evidence that the deceased was forcefully and wrongfully detained. The presence of his DNA on some of the exhibits recovered from the Bercham house particularly his shorts and the receipt from Tejani Medical Services Sdn Bhd. in his name, fortified the prosecution's case that the Bercham house was where the offences were committed.

[125] The prosecution's case is that the deceased was kidnapped between 20–29 April 2007.

[126] The evidence of PW26 shows that the deceased had left his house on the night of 20 April 2007 about 10pm. The prosecution adduced evidence which shows that on 21 April 2007, the following day, transactions were made using the deceased's credit card. Two transactions were made on that date. The evidence of the first transaction is in the form of the receipt issued by 'The Store Jalan Kampar'. The time of the transaction was 12.07pm. The second transaction was made at Jaya Jusco Ipoh at 3.23pm. The evidence on the second transaction was adduced through PW11, PW12 and PW13 and various documentary evidence in the form of the cash memo (exh P28B) and credit card slip (exh P28A). The third transaction took place on 22 April 2007 at 5.30pm also at Jaya Jusco Ipoh. The evidence that these transactions took place is not in dispute. The prosecution's case is that it was the second appellant who had used the deceased's credit card on those two dates which the second appellant denied.

IDENTIFICATION EVIDENCE

[127] The prosecution adduced evidence through PW11 and PW12. Both had identified the second appellant as the man who had used the deceased's credit card at Jaya Jusco Ipoh. Learned counsel submitted that the trial judge had erred in accepting the identification evidence of PW11 and PW12. It was

submitted that their evidence was of little value and ought not to have been given much weight since four years had elapsed between the date of the incident and the trial.

[128] We are mindful that in a case where the prosecution relied wholly or substantially on the identification of an accused person, the court ought to have in mind the guidelines set out in *R v Turnbull and others* [1976] 3 All ER 549 when assessing the quality of the identification evidence ('the *Turnbull* guidelines'). Lord Widgery CJ (as he then was) speaking for the English Court of Appeal said (p 551):

> First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken ...

At p 552 the court said:

> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? ... Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

The court said further:

> All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment, when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution. Were the courts to adjudge otherwise, affronts to justice would frequently occur ...
>
> When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then

withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification ...

A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if in the judgment of this court on all the evidence the verdict is either unsatisfactory or unsafe.

[129] In his grounds of judgment, the trial judge said as follows:

I am satisfied with the dock identification of the second accused by SP11 and SP12, the promoter and the cashier of Jaya Jusco Ipoh respectively.

According to SP11, she said she could identify the second Accused because he came on two consecutive days that is 21 and 22 April 2007 to make some purchases from her in Jaya Jusco Ipoh. Firstly, she said the second accused was wearing the same black cap, and a faded blue color jacket. She said she could see the second accused clearly although the incident happened four years ago. She said she spent time explaining to the second accused how to operate the handicam which the second accused purchased. They were at a close distance of 1 to 2 feet. SP11's evidence was corroborated by SP12's evidence. According to SP12, she could identify the second accused as a Chinese teenager with his hair above his neck and without moustache. She said she could identify the second accused as the second accused came on two consecutive dates wearing a black cap and a faded blue jacket.

I find that the evidence of SP11 and SP12 was never shaken at all. I have no reasons not to believe them as they have no reasons to tell lies in court.

Although SP11 and SP12 only identified the second accused through dock identification, I find that such a dock identification based on the reasons given by them is proper and can be safely accepted.

[130] We have perused the testimony of PW12. In re-examination she was asked whether she was certain on her identification of the second appellant. The notes of evidence show as follows (p 269 appeal record *Jld* 2b):

Soalan 10 — Kenapa kamu benar-benar boleh cam OKT2 sebagai pelanggan yang telah membuat bayaran di kaunter kamu pada 21 dan 22.4.2007?

Jawapan — Saya ada berkomunikasi dengan dia dan saya ada tanya semalam awak sudah datang dan hari ini awak datang lagi. Dia cakap dia nak beli barang lagi oleh sebab itu dia datang lagi. Ini sebab saya boleh mengecam dia.

[131] It is trite law that the view of the trial judge as to the credibility of a witness must be given proper weight and consideration. An appellate court should be slow in disturbing such finding of fact arrived at by a trial judge, who had the advantage of seeing and hearing the witness, unless there were substantial and compelling reasons for disagreeing (per Hasan Lah FCJ in *Amri bin Ibrahim & Anor v Public Prosecutor and another appeal* [2017] 1 MLJ 1; [2017] 1 CLJ 617). Although the trial judge did not mention the *Turnbull* guidelines in his grounds of judgment, his judgment shows that His Lordship had considered the evidence and the prevailing circumstances when evaluating

the evidence on the identification of the second appellant. The trial judge was satisfied that it was safe to accept the identification evidence. We have no reason to disagree with the finding of the trial judge that PW11 and PW12 are credible witnesses and their identification evidence can be safely accepted. PW12 in particular, was attentive and perceptive enough to notice not just the second appellant's attire but also his general appearance, his hair and face. She formed the opinion that the second appellant was a teenager.

[132] On the evidence we find that the prosecution has proved that it was the second appellant who had used the deceased's credit card on 21 April 2007 and 22 April 2007 at Jaya Jusco Ipoh to buy the handycam and the teddy bear. Both the handycam and the teddy were recovered from the second appellant. This finding demolishes the contention of the second appellant that it was Dolphine who had used the deceased's credit card to purchase the handycam at Jaya Jusco Ipoh. The defence had also contended that the teddy bear was purchased at The Store Jalan Kampar. We find that the evidence of PW12 on her recollection of the teddy bear shows that it was bought at Jaya Jusco Ipoh. This is what she said:

> Soalan 16 — Kenapa kamu tidak setuju dengan pandangan peguam bahawa kamu tidak pasti teddy bear ini ID31A adalah teddy bear terlibat dalam transaksi berkenaan?
>
> Jawapan — Sebab saya masih ingat lagi teddy bear ini ada pakai ribbon.

[133] The evidence which reveals that on 21 April 2007 and 22 April 2007 the second appellant had in his possession the deceased's credit card establishes a link between the second appellant and the deceased. It shows that from 21 April 2007 he had access to and control over the deceased. The evidence that he had used the deceased's credit card for his own purpose shows that the second appellant was able to exert his will over the deceased. The irresistible inference that arises from this evidence is that he must have known that the deceased had been abducted and was held captive at the Bercham house. This evidence incriminates him in the kidnapping of the deceased (see *Idris v Public Prosecutor* [1960] 1 MLJ 296; [1960] 1 LNS 40).

[134] The prosecution case that the Bercham house was the place where the offences were committed was not challenged. However, like the first appellant, the second appellant contended that he had not gone to the house from 18–29 April 2007. The appellants said that they did not get any computer to service or repair during that period. The first appellant further testified that on 18 April 2007 Dolphine had come from Penang and had wanted to use the house because he did not want to stay in a hotel. The first appellant had given to Dolphine the only set of keys to the house.

[135] The trial judge did not accept the first appellant's evidence that between

18–29 April 2007 there was no computer to repair or service. His Lordship found the reason strange. We agree with the trial judge. The testimony of the second appellant shows that from the time they had started renting the house (9 April 2007) till 16 April 2007 (the date when he said the last computer was repaired), he had repaired and serviced about 23 computers. If this evidence was true, then the decision of the trial judge not to accept the explanation given by the first appellant is not unreasonable. We agree with the trial judge that it did appear strange that suddenly from 18 April 2007 there was no computer to repair or service when, according to the second appellant's evidence, in the eight days from 9 April 2007 (the date of commencement of the tenancy) to 16 April 2007 they had received 23 computers to service or repair.

DNA EVIDENCE

[136] Learned counsel had referred to a paragraph in the report prepared by the chemist, PW27, wherein she had stated as follows:

> The DNA profiles were successfully developed from the above samples *except from hairs 'T26', 'T27' and 'T44' and bloodstains on nail clippings 'T20 ' and 'T21', cloths 'T22 ' and 'T39', string 'T23' and shorts 'T35'*. (Emphasis added.)

Learned counsel submitted that in cross-examination PW27 had agreed that the hair samples from 'T26', 'T27' and 'T44', and bloodstains on 'T20', 'T21', 'T22', 'T23', 'T35' and 'T39' could have originated from an unknown person. It was submitted that Dolphine's DNA could possibly be on those samples.

[137] Learned DPP in reply submitted that this is incorrect. It was submitted that what PW27 had said was that she could not develop DNA profiles on those samples. Therefore it is not correct to say that those samples may contain DNA of an unknown person.

[138] The notes of evidence show that in re-examination PW27 was asked to explain what she had meant when she had stated in her report that she could not successfully develop DNA profiles from hair samples 'T26, T27 and T44 ... and shorts T35'. PW27 explained as follows (p 633 appeal record *Jld* 2d):

> Maksud saya, saya tidak dapat menghasilkan profile DNA daripada rambut T26 hingga shorts T35.

[139] We agree with the DPP that learned counsel's submissions are incorrect. What PW27 had said was that she could not successfully develop DNA profiles on those samples. This meant that no DNA profile was available from those samples for PW27 to analyse. To interpret the statement as meaning that there is a possibility that the DNA of unknown persons or Dolphine could have been on the samples is a misrepresentation of the meaning of the statement. In the

circumstances we find that there is no basis to presume, as learned counsel had done, that these samples may contain the DNA of unknown persons or Dolphine.

ALIBI

[140] The complaint raised by learned counsel on the issue of the alibi defence is that the trial judge had confused the second appellant's alibi witness DW4 with DW2, who was the alibi witness for the first appellant. Learned counsel had submitted that this confusion caused the trial judge to misappreciate the second appellant's defence and led to his finding that the evidence of DW3 had completely destroyed the purported alibi defence raised by DW2. It was submitted that this had occasioned a grave miscarriage of justice which rendered the conviction of the second appellant for both offences unsafe. Learned DPP in reply had submitted that this was a typing error. The trial judge had found DW4 credible even though her mother DW5 had described her as *otak lembab*. Learned DPP submitted that notwithstanding the apparent error, the trial judge was correct in finding that the evidence of DW4 had completely destroyed the purported defence raised by DW2.

[141] We find that it is obvious that the trial judge was referring to DW4 even though in his judgment he referred to her as DW3. This can be seen from his judgment when he stated as follows:

> I find that SD3 is a witness with a simple mind and is a truthful witness despite the fact that she had some health problems.

The sole alibi witness who was described in such terms was DW4, the second appellant's sister. We are inclined to treat the mistake as a typing error.

[142] The trial judge found that the evidence of the second appellant's sister did not support his alibi defence. DW4 had stated she had stopped work in March. She started working again in April 2007. But on the days when she was not working, she saw the second appellant going to work. She said the second appellant left for work at 8–9am and he would return home between 7–8pm. DW5, the second appellant's mother, on the other hand testified that in April 2007 the second appellant would repair computers at home. The trial judge accepted the testimony of DW4 instead of the testimony of DW5. As we have mentioned earlier the trial judge who has audio-visual advantage is entitled to do so. We find that despite the error on the face of the record in respect of the references to the alibi witnesses, no prejudice was occasioned to the second appellant's defence. The defence of alibi has failed to raise a reasonable doubt in the prosecution case.

FAILURE OF THE POLICE TO PROPERLY INVESTIGATE

[143] In connection with the alibi defence, learned counsel faulted the police for not carrying out investigation on the alibi notice. We find nothing turns on this issue. The alibi witnesses are the second appellant's close family members. Had investigation been carried out and statements recorded from these witnesses, it is reasonable to expect that whatever statement that they may give would not be different from their testimony in court. We do not find that the failure by the police to investigate the alibi notice has prejudiced the second appellant's defence. On the contrary, in our view the failure of the police to investigate the alibi notice deprived the prosecution of the opportunity to rebut the alibi evidence. This would be to the second appellant's advantage.

COMMON INTENTION

[144] The prosecution relies on s 34 of the Penal Code. Thus common intention must be established by the prosecution to prove that the kidnapping and murder of the deceased were committed by the appellants in furtherance of the common intention of both of them.

[145] Learned counsel submitted that the prosecution failed to prove that:

(a) the second appellant was present at the scene of the crime at the time the crimes were committed; and

(b) there was prior concert of a prearranged plan involving the second appellant.

In respect of both grounds, learned counsel submitted that the only evidence adduced by the prosecution was the fact that the appellants had the common intention to rent the Bercham house and the reason for this had been sufficiently explained by the appellants. The presence of the second appellant's DNA in the house can be attributed to the fact that he had been to the house to carry out repairs and service of computers. The evidence does not necessarily prove that the second appellant was present at the scene of the crime at the material time. There is no evidence that there was a concerted effort by both appellants to discuss the carrying out of the plan to kidnap and murder the deceased. Learned DPP submitted that presence of the co-accused at the scene is not a necessary requirement to attract s 34 of the Penal Code.

[146] We agree with the DPP that presence at the scene of the crime is not necessary for s 34 to apply but presence on the spot for the purpose of facilitating or promoting the offence is itself tantamount to actual participation in the criminal act. In the case of *Farose bin Tamure Mohamad Khan v Public Prosecutor and other appeals* [2016] 6 MLJ 277; [2016] 9 CLJ 769, learned counsel for the first accused therein submitted that the first accused's conduct

did not fall within the ambit of s 34 because the first accused neither participated in the acts which caused injuries to the deceased nor was he physically present at the scene of the crime. The Federal Court through the judgment of Raus Sharif PCA (as he then was) said:

> Presence is not necessary to constitute participation in every case. It is sufficient for the accused to have done an act with some nexus to the offence (*Sabarudin Non v PP & Other Appeals* [2005] 4 MLJ 37; [2005] 1 CLJ 466 and *Manikumar Sinnappan & Ors v PP* [2015] MLJU 1956; [2017] 3 CLJ 505; [2015] 1 LNS 1344; [2016] 2 MLRA 1).
>
> A common intention may often be difficult to prove by way of direct evidence in practice, but it can be inferred from the circumstances of the case and the conduct of the accused (*Dato' Mokhtar Hashim & Anor v PP* [1983] 2 MLJ 232; [1983] 2 CLJ 10; [1983] CLJ Rep 101).

In the case of *Ong Teik Thai v Public Prosecutor* [2017] 4 MLJ 421; [2016] 7 CLJ 1 this court held that participation of the individual offender in the criminal act in some form or the other is the leading feature of the principle of constructive liability under s 34 of the Penal Code. Thus, it is essential that there should be evidence of common intention, or evidence from which such common intention to commit the offence actually committed can properly be inferred (see *Shamsuddin bin Hassan & Anor v Public Prosecutor* [1991] 3 MLJ 314 at p 316; [1991] 3 CLJ 2414; [1991] 1 CLJ Rep 428 at p 431 (SC) and *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336).

CIRCUMSTANTIAL EVIDENCE

[147] In the case of *Idris v Public Prosecutor*, the court quoted with approval the words of Lord Cairns in the case of *Belhaven and Stenton Peerage* (1875) 1 App Cas 278 at p 279 on the definition of circumstantial evidence as follows:

> My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united form of all the circumstances put together. You may have a ray light so feeble and that by itself will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavoring to dispel.

[148] In the present case, the trial judge found that the circumstantial evidence adduced had established beyond reasonable doubt that the two appellants were the only perpetrators of the two offences in furtherance of the common intention of both of them. In arriving at his finding, the trial judge accepted the following evidence which shows common intention between the appellants:

(a) the two appellants were the occupants of the Bercham house;

(b) the deceased's handphone was recovered from the first appellant;

(c) the record of SMS messages retrieved from the deceased's handphone (exh P19A) tallied with the SMS messages recorded in the book exh P18A;

(d) the first appellant had led the police to the Bercham house which shows that he knew of the existence of the exhibits recovered from the said house;

(e) the keys to the house were recovered from the first appellant;

(f) the roll of blue cloth found in the Bercham house came from the Recycle Department of the association which showed a link between the first appellant and the deceased;

(g) the evidence of the chemist which shows that one end of the blue cloth used to wrap the deceased's body was a complementary fit with a roll of blue cloth recovered from the Bercham house;

(h) the wooden chairs and cushions bought by the second appellant from the association were found inside the Bercham house;

(i) the first appellant led the police to the recovery of the deceased's car;

(j) the key to the deceased's car was recovered from the first appellant;

(k) the second appellant had used the deceased's credit card to purchase the Sony handycam (exh P29B) on 21 April 2007 and a Sony digital camera (exh P31A) and a teddy bear (exh P31A) on 22 April 2007 from Jaya Jusco Ipoh;

(l) PW11 and PW12 who had attended to the second appellant had positively identified him as the person who had purchased the items;

(m) the Sony handycam was recovered from the second appellant;

(n) the teddy bear was recovered from the second appellant's girlfriend;

(o) a receipt from 'The Store 203 Kampar' in the deceased's name dated 21 April 2007 for the sum of RM180.66 which shows the transaction time as '12.07' was recovered from the second appellant's wallet; and

(p) the findings by the chemists on the evidence recovered from the Bercham house which show that both the deceased and the second appellant were present in the house.

[149] On the evidence adduced, we agree with the trial judge that there is sufficient evidence to show that both the appellants had acted in concert to kidnap the deceased and later murdered him. Both the first and second appellants were friends. The first appellant knew the deceased. The second appellant testified that he did not know the deceased. The question that arises

then is how did he have the deceased's credit card in his possession? A reasonable possibility is that he had been given the card by the first appellant.

[150] The act of renting the Bercham house is evidence of a pre-arranged plan. The tenancy of the house commenced on 9 April 2007. Approximately two weeks later the deceased was kidnapped. The usage of the deceased's credit card together with the recovery of the handycam and the teddy bear show that the second appellant was complicit with the first appellant in the commission of the crimes.

DOLPHINE

[151] Dolphine is central to the defence of both appellants because both suggested that he must be the real perpetrator of the crimes. But at no time did the appellants inform the police about Dolphine. The second appellant did not inform PW20 that Dolphine had given him the handycam and the teddy bear. No question was put to any of the prosecution witnesses to suggest the defence case that Dolphine was the person who had committed the crimes.

[152] The suggestion that Dolphine was the perpetrator of the crimes surfaced during the defence stage. Particulars about Dolphine came in the defence of the first appellant. He had described Dolphine but the particulars he gave in his evidence were too sketchy to be meaningful. We agree with the DPP that the defence was an afterthought. The introduction of this belated version would certainly weaken the appellant's credibility (see *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 236 (FC)). Even if Dolphine exists, there was no evidence to link him to the crimes except for the allegations made by the appellants.

CONCLUSION

[153] Based on the aforementioned reasons, we find no merit in the second appellant's appeal. We are satisfied that the conviction of the second appellant was safe. We accordingly affirm the conviction and the death sentence imposed by the learned High Court judge and affirmed by the Court of Appeal. His appeal against conviction and sentence on both charges are dismissed.

Appeal against conviction and sentence on both charges dismissed; conviction and death sentence imposed by High Court and affirmed by Court of Appeal affirmed.

Reported by Afiq Mohamad Noor